Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

EUGENE A. SCHMITZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Eugene A. Schmitz,
pro se
Reg. No. 04003-089
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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in affirming the decision of the District Court, which found petitioner to be a supervisor of a drug conspiracy so as to merit an enhancement in his sentence under United States Sentencing Guidelines Section 3B1.1(c)?

The decision of the Court of Appeals is inconsistent with their prior holdings in similar cases, as well as the holdings of other Circuits in similar cases.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, dated August 7, 1997, which affirms the sentence of the District Court for the Eastern District of Wisconsin is attached hereto as Appendix A, and is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 7, 1997. No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has had his right to Due Process of the law, under the Fifth Amendment, violated. The Due Process clause of the Fifth Amendment states as follows:

> nor be deprived of life, liberty, or property without due process of the law.

Further, the District Court erred when it found petitioner to be an "organizer/supervisor" under United States Sentencing Guideline section 3B1.1(c). Section 3B1.1(c) U.S.S.G. provides:

> (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

STATEMENT OF THE CASE

On August 19, 1994, petitioner was sentenced to sixty (60) months imprisonment on a charge of possession with intent to distribute marijuana. While serving this sentence, petitioner was indicted by a federal grand jury in Milwaukee, and an indictment was issued on May 7, 1996, alleging that prior to petitioner's completion of the proceedings in the first criminal case, petitioner made arrangements for drug transactions to take place on his behalf, in his absence. Count I alleged a conspiracy to distribute cocaine in violation of Title 21 U.S.C. 846. Count II alleged conspiracy to commit money laundering, in violation of Title 18 U.S.C. 371.

Pursuant to the plea agreement, petitioner pled guilty to both counts of the indictment on August 2, 1996. Pursuant to the plea agreement, both parties stipulated the amount of cocaine involved in Count I for sentencing purposes was between 400 and 500 grams. Also, both parties agreed that the guideline range for the money laundering (Count II) was 20 and that Count II will be grouped with the drug offense pursuant to U.S.S.G. 3D1.2. Finally, the Government agreed to recommend that petitioner receive a three-level reduction for acceptance of responsibility under Section 3E1.1 of the U.S.S.G.

The District Court had jurisdiction over the subject matter in this case pursuant to Title 18 U.S.C. 3231 because this case was a criminal case alleging violations of the laws of the United States under Title 21 United States Code.

Sentencing took place on October 11, 1996. At this time petitioner raised an objection to the findings of the Pre-sentence Investigation Report (PSI) that found petitioner to be an "organizer, leader, manager, or supervisor" in criminal activity under 3B1.1(c).

An inquiry was conducted at sentencing at which time the government argued the position advanced by the PSI, that petitioner brought together people who had not been previously involved in this conspiracy. The government also argued that petitioner recruited his wife and directed her activities while he was in prison.[1] Basically, the government argued that the instant conspiracy was petitioner's idea, he planned it, he put the people in place and he instructed his wife in her dealings.

Counsel for petitioner raised objections to the findings of the PSI at sentencing, and also attempted to refute the position advanced by the government that petitioner was an "organizer/supervisor" in this conspiracy. Counsel argued at the time of his prior sentencing for the unrelated charge of possession with intent to distribute marijuana, the individuals involved in the instant conspiracy were already known to each other and involved in drug transactions relating to the

---

[1]Petitioner was serving his 60 month sentence at the federal prison camp in Duluth, Minnesota. The government, through evidence of taped phone conversations and written correspondence between petitioner and his wife, Elaine Schmitz, alleged that petitioner used coded language to direct his wife in drug transactions and financial matters related to those drug transactions while he was incarcerated.

instant conspiracy.

Petitioner had been purchasing ounce-sized quantities of cocaine from Frank Cranshaw and then re-selling the cocaine to Judy LaMacchia prior to his sentencing for the earlier conspiracy. Petitioner merely asked his supplier, Cranshaw, and his buyer, LaMacchia, if his wife could serve in his role while he was in prison: a role his wife was no stranger to and one she wholeheartedly embraced.

Therefore, counsel argued there was no recruitment of any accomplices; all the players in the conspiracy were already in place and actively participating when petitioner was sentenced for the prior drug case.

Counsel also argued at the sentencing hearing that petitioner played no greater a role in this offense than did any of the other participants. In fact, petitioner played a lesser role because he was in prison and not able to take part in any of the transactions or decisions related to any of the transactions.

Despite counsel's objections, the District Court adopted the findings of the PSI. The District Court believed petitioner to have engaged in the recruitment and organizational aspects of the offense; that he exercised decision making authority; and, that he had enjoyed a larger share of the profits.

Thus, with the 2-pt. enhancement under 3B1.1(c)

added to petitioner's base offense level it became 23. Petitioner's guideline sentencing rage was 57 to 71 months, without the enhancement petitioner's base offense level would have been 21 and his guideline sentencing range would have been 46 to 57 months.

Finally, the District Court imposed a sentence of 68 months to be served consecutively to the 60-month sentence petitioner was already serving for the prior unrelated case.

After sentencing, petitioner, pursuant to Federal Rules of Appellate Procedure Rule 4(b), filed a timely Notice of Appeal to the Court of Appeals for the Seventh Circuit. Jurisdiction was conveyed on the Court of Appeals for the Seventh Circuit pursuant to Title 28 U.S.C. 1291 because a final judgment/order was entered in the District Court.

In his direct appeal, petitioner argued that the District Court had committed clear error in finding him to be a "organizer/supervisor" of the conspiracy so as to merit a 2-pt. enhancement under U.S.S.G. 3B1.1(c).

On appeal, petitioner maintained that he should be held no more responsible for the commission of the offense than any of the other participants. His role was merely that of a steerer, which is one who brings together a seller and a buyer in the hopes of earning a "finders fee" in the event any business is conducted. Petitioner further exhibited that he in fact had less authority and decision making powers in the conspiracy than did the other members, because he was in

prison. Petitioner's wife hid from him the fact that she was even doing any drug business in his absence, she also negotiated her own amounts of drugs to purchase and when and how she would purchase the drugs.[2]

On appeal the government maintained the same position as they had in the district proceedings.[3]

On August 7, 1997, the Court of Appeals for the Seventh Circuit affirmed the decision of the district court. The decision was unpublished. Also, there was no oral argument heard on the merits.

This petition for writ of certiorari follows.

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[2]The facts contained herein the petition regarding the position petitioner took on his direct appeal come from the "Brief of Defendant-Appellant" filed in the Seventh Circuit.

[3]The facts contained herein, regarding the position the government took on petitioner's direct appeal come from the "Brief of Plaintiff-Appellee" filed in the Seventh Circuit.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted to Determine Whether the Court of Appeals Erred in Finding that the District Court Did Not Commit "Clear Error" When it Enhanced Petitioner's Sentence for his Role in the Offense Under U.S.S.G. 3B1.1(c).

Section 3B1.1(c) of the Sentencing Guidelines provides:

> a defendant is to receive a two-level enhancement if he was an "organizer, leader, or supervisor" of criminal activity involving fewer than five participants.

In considering an enhancement under Section 3B1.1(c) the District Court generally looks at the degree of control a defendant has over the other co-conspirators, but also: (a) the exercise of decision-making authority; (b) the character of the participation; (c) the recruitment of accomplices; (d) the claim to a larger share of the profit; and (e) the extent to which the defendant planned and organized the offense. United States v. Granado, 72 F.3d 1289-90 (7th Cir. 1997). Although no one factor dictates the application of this enhancement, "control" of others is the main focus of this enhancement.[4] Without a showing that the defendant had

[4]However, a single factor does not automatically justify imposition of this enhancement. United States v. Mankiewicz, 122 F.3d 399 (7th Cir. 1997).

control over others, even a defendant with an important role in an offense cannot be deemed a manager. United States v. Hoac, 990 F.2d 1099, 1110-11 (9th Cir. 1993).

On appeal to the Seventh Circuit petitioner argued that the enhancement was not merited because there was no proof that he exercised control over others from behind prison walls. Further, petitioner argued that his wife, Elaine Schmitz, negotiated her own drug transaction; thus, she exercised control over the conspiracy and stripped petitioner of any decision-making authority he could have had. Petitioner also asserted that due to the fact he was in prison, he did not have an integral part in the conspiracy. Largely, petitioner knew nothing of what was actually taking place in regards to drug transactions in his absence. Lastly, petitioner contended that he merely sought to allow a conspiracy to continue to operate that was already on-going, so there was no recruitment of accomplices or new organization.

On appeal, petitioner stated that his role in the offense could be summed up as that of a "middle-man" or a "steerer," which is merely one who brings buyers and sellers of drugs together in the hopes of receiving a "commission." See United States v. Brown, 944 F.2d 1377 (7th Cir. 1991); United States v. Sostre, 967 F.2d 728 (1st Cir. 1992); United States v. Copeland, 902 F.2d 1046, 1049 (2d Cir. 1989); United States v. Colon, 884 F.2d 1550 (2d Cir. 1989).

Petitioner believes he is entitled to relief because the Seventh Circuit erred in affirming the decision of the District

Court, which held that the circumstances surrounding petitioner's offense conduct merit a 2-pt. enhancement under Section 3B1.1(c). Other Circuits, specifically the Second, the First and the Ninth, have held that conduct similar to petitioner's would not merit a 2-pt. enhancement under Section 3B1.1(c). See United States v. Sostre, and U.S. v. Hoac.

Therefore, certiorari should be granted to determine if the Seventh Circuit applied the Section 3B1.1(c) enhancement in a manner inconsistent with the holdings of other Circuits, as well as with its own determinations under 3B1.1(c).

The primary concern of Section 3B1.1(c) is the imposition of a punishment commensurate with the defendant's "relative responsibility within a criminal organization." United States v. Fones, 51 F.3d 663, 665 (7th Cir. 1995). An increase under Section 3B1.1 is appropriate for those defendants whose "relative responsibility" for the offense is found to have been greater than that of its other participants. United States v. Skinner, 986 F.2d 1097 (7th Cir. 1993); see also United States v. Vargas, 16 F.3d 155, 160 (7th Cir. 1994).

In determining "relative responsibility" for the offense, a significant factor to be considered is whether the defendant exercised authority or control over others in the criminal operation. Id.; see also Brown at 1385. As in Vargas, petitioner did not have any more responsibility for this offense

than did the other participants. Any attempt petitioner made to have any control in the conspiracy was merely ignored by the other members. (App. B and D)

Petitioner certainly did not play as great a role in this offense, from his prison cell, as did his wife (petitioner's wife was the focus of the government's position as to the 3B1.1 enhancement). In the instant conspiracy, the members had all been involved in drugs for quite some time, in relation to this conspiracy, as well as other drug activities. See Cranshaw debriefing, attached hereto as Appendix B, and LaMacchia debriefing, attached hereto as Appendix C. Here we have four equal-culpable defendants, but the District Court found fit to enhance only the sentence of petitioner, even though he was unable to participate in any of the dealings from his prison cell. The Court of Appeals erred in not comparing the acts of each participant in this conspiracy to determine "relative" responsibility as case law directs them to do. United States v. Mustread, 42 F.3d 1104 (7th Cir. 1995) (defendant must have some sort of aggravated role relative to the other participants to support an increase under 3B1.1(c)) (emphasis added); see also Skinner, at 1091, 1099 (noting that no 3B1.1 adjustment must be imposed where a defendant was not relatively more responsible than other participants).

Petitioner's wife (herein referred to as Elaine) merely assumed the position of the go-between for Mr. Cranshaw and Ms. LaMacchia, a position petitioner previously held. In Mustread at 1105, the Seventh Circuit "found 3B1.1 unwarranted where defendant did not exercise decision

making authority over other participants and where conspiracy was ongoing for year before defendant arrived on the scene . . ." (emphasis added). Both Mr. Cranshaw and Ms. LaMacchia admit this was an ongoing conspiracy, so there was not some sort of "fresh" recruitment of accomplices. All participants knew each other before Elaine stepped in.

Furthermore, Elaine was previously aware that petitioner had dealings ongoing with Mr. Cranshaw and Ms. LaMacchia prior to his incarceration. Thus, when Elaine stepped in and assumed petitioner's role, there was not some new, fantastic organizational structure laid down by petitioner before he went to prison, notwithstanding the government's position.

Also, quite clear is the fact that when Elaine stepped into petitioner's role, she assumed control of her own ship. Not only did Elaine and Mr. Cranshaw not tell petitioner that they were doing "business" (App. B at 2 & App. D at 5), but Elaine also attempted to negotiate the terms of her drug purchases, including the amount she would buy and how much she was going to pay for the cocaine (App. D at 5). These are hardly the actions of someone under supervision. What type of supervisor would not be privy to the fact that business was ongoing, or would not have a say in purchase amounts, or how much should be paid? Petitioner certainly was no Sam Walton. In fact, petitioner had less supervisory authority in this conspiracy than does a 16-year old assistant manager at McDonald's. This is because Elaine neither asked

nor had any need for supervision.

However, in an attempt to lessen her role in the conspiracy, upon arrest Elaine stated, "petitioner was insistent in his urging her to buy drugs from Mr. Cranshaw and sell them". This, the government contends justifies the enhancement under U.S.S.G. Section 3B1.1(c). However, a responsible person who did not wish to participate would have just denied petitioner's urges, but, because Elaine wanted to sell cocaine--she did, albeit under her own terms.

Absent from the rationale of the Appellate Court was the fact that petitioner was hundreds of miles away in prison and in no way could he have exercised any "direct" influence or "control" over her life or that of the other participants, no matter how much "urging" he may have done. See Mustread, at 1103.

> Thus at a minimum, a defendant must have had some real and direct influence, aimed at furthering the criminal activity, upon one other identified participant.

See also Brown, at 1385.

> Section 3B1.1 requires the exercise of some authority in the organization, the "exertion" of some degree of control, influence, or leadership. (Emphasis added)

Here, petitioner merely suggested to his wife a way to earn extra income, while he was away in prison. Although he did urge her, this cannot be said to constitute supervision of a co-conspirator under Section 3B1.1(c). Nor can the fact that he ok'd it with his supplier, Mr. Cranshaw and his purchaser, Ms. LaMacchia to deal with Elaine in his absence constitute organizing under the same. See Mustread, at 1104 (If defendant maintained no real guiding influence or authority over the purchasers, a 3B1.1 adjustment is inappropriate) Brown, at 1381. The Seventh Circuit was in error to find that these acts merit enhancement under U.S.S.G. Section 3B1.1(c).

The dictionary and common definition of supervise means:

> to coordinate, direct and inspect continuously and at first hand the accomplishment of: oversee with the powers of direction and decision the implementation on one's own or another's intentions". (Emphasis added)

Webster's Third New International Dictionary 2296 (1976). "Organize" is defined to mean "to arrange by systematic planning and coordination of individual effort". Id. at 1590. Petitioner, then, cannot be said to have exhibited a level of involvement in this conspiracy that meets either definition. Because he was hundreds of miles away, petitioner certainly could not have been involved, first hand, in supervising anyone, nor could he coordinate or plan the individuals

efforts from prison. Mustread, supra. During most of the duration of the conspiracy, petitioner was unaware that any drug transactions were even taking place. The other participants did not even inform petitioner of their ongoing activities until some time after the fact; the participants coordinated their own efforts individually, free of any outside impetus from petitioner, other than his alleged urging and prodding.

In the instant case, petitioner is guilty of suggesting a crime. Suggesting a crime cannot be said to merit an enhancement under U.S.S.G. Section 3B1.1(c). After petitioner went to prison it was fully up to the participants in this conspiracy to make their own decisions and plans to facilitate the conspiracy. It is painstakingly clear that each participant had more control, decision making authority, planning and organizational capabilities in this conspiracy than did petitioner.

However, on appeal the government asserted that petitioner's calls from prison were "directing" Elaine. Petitioner contends that these calls merely served to see if any transactions were occurring and if his wife was okay, in the event that any transactions were occurring. Petitioner hoped she was doing business and in fact did inquire about it; however, checking to see if she had done any business or that she is safe can hardly be said to be "directing". Although he was insistent in his questions concerning drug transactions, petitioner never gave any orders or commands relating to the transactions, as one who truly had supervisory capabilities

would do. Never did petitioner imply any threats that may have made Elaine or the other participants feel as though they had to partake or else! United States v. Bush, 79 F.3d 67 (7th Cir. 1996) (defendant's wife said she feared her husband, this is why she partook in the conspiracy). All participants in this conspiracy were free to not partake in drug transactions, regardless of petitioner's requests, but they all did because they already had been and would continue, without the suggestions of petitioner. Mustread, supra at 1105.

Furthermore, on appeal the government alleged that the enhancement was proper because petitioner also had a right to a larger share of the profit, as well as control over it. How can this be when petitioner is hundreds of miles away in prison and is unaware that drug transactions are even taking place? How could petitioner have known what share he was entitled to, if he did not even know that any drug transactions had occurred?

When the search warrant was executed on Elaine's residence, agents found over $8,000.00 in cash. It can hardly be said that the $2,000.00 Elaine sent to petitioner to his prison commissary account over the course of 16 months would suffice to comprise a larger share of the profits. (PSI at 8&9 par. 13&14). Petitioner was under the assumption that the money in his commissary account was coming from the monthly mortgage checks he received from investments he had prior to his incarceration. (App. D at 3). Again, we have a case of the alleged underling deceiving the alleged supervisor.

Neither did the petitioner have control over the profits, nor did he "direct" Elaine in "using various financial records to conceal drug proceeds." (Gov. Br at 7.) On appeal, the government claims that, because Elaine purchased money orders with "alleged drug profits" (cash) and then sent them to petitioner for his use in prison, the 2-pt. enhancement is justified. (Gov. Br at 10). However, the government theory omits the more correct common-sense view.

First, just because someone buys a money order with cash does not mean the cash is from drug profits. Most people, if not all, use cash to purchase money orders. Second, the only way an inmate can receive money in prison is via a check or money order. A check sent to an inmate takes 15 days to clear; therefore, money orders which clear immediately and are subsequently available for use by an inmate sooner are the preferred method of inmates for receiving money while in prison. So, the fact that Elaine sent petitioner money orders should not be construed to amount to petitioner having supervised Elaine regarding the alleged financial aspects of the conspiracy.

Quite clear is the fact that Elaine, not petitioner, controlled the financial aspects of the conspiracy; it was Elaine who decided what to do with the profits and how they would be used. Elaine writes in a letter to petitioner, dated 10/11/94, that she found check stubs dated 10/20/93, from Midwest National Life Insurance Co., totaling $4,246.34 and that she planned to buy a two-year certificate of deposit in that amount. She goes on to write:

> I'll do a few at a time. Just as long as I can provide documentation as to where the funds come from, I should be okay.

(PSI at 9 par. 14).

Also, it was Elaine who wrote petitioner seeking a list of accounts he closed, so that "she could deposit money into her accounts and cover it with these legitimate sources". Id. These hardly sound like the words of someone being supervised or someone who was directed and told what to do. Elaine was not asking for permission or directions; she was making her own decisions and acting on her own to conceal her ill begotten gains. A supervised person in similar circumstances would seek approval before deciding what course of action to take. United States v. Camargo, 908 F.2d 179, 185 (7th Cir. 1990) (fact that co-conspirator was unwilling to act without defendant's consent implied defendant exercised control in the conspiracy).

As has been illustrated, Elaine alone decided how, when and where she would purchase drugs. She tried to control the purchase price and she did control the purchase amounts and the resale amounts and prices. (App. D at 5&6). Never did she ask petitioner how much she should buy at a time, when should she make purchases and how much she should pay. All these aspects she handled without even telling petitioner she was buying and selling cocaine, until after she had been doing it for a length of time.

Also, Elaine decided how the illegal money would be concealed and spent. She did not ask petitioner what she should do with the illegal money, she told him what she was going to do with the tainted fruits. Elaine was in control of every decisional aspect of this crime, from handling the drugs, to the profits. See United States v. Bell, 28 F.3d 615, 618 (7th Cir. 1994) (concluding 3B1.1 enhancement was improper without evidence tending to show that the defendant claimed a larger share of the proceeds or exercised control over another co-conspirator or over drugs). Petitioner cannot lay claim to any of these elements, either, under 3B1.1(c). Thus, petitioner's role has been shown to be far less critical than Elaine's. Indeed, petitioner played a much lesser role than did Elaine, in this conspiracy. Even if petitioner's role would have been on par with Elaine's, which is was not, this would still not call for the enhancement of petitioner's sentence under Section 3B1.1(c). See Mustread, at 1105 (a defendant and co-defendant who were equal partners in crime would not call for the enhancement of one defendant over the other). Therefore, a defendant who had no greater role than any other participant cannot receive a 3B1.1 increase. Brown, at 1381-82.

The only thing petitioner is guilty of is "suggesting" a crime and then repeatedly inquiring about the status of the situation, while he was in prison. However, the inquiring never rose to a supervisory level: asking his wife if she had done any business, no matter how many times petitioner asked, does not constitute supervising and should not merit an enhancement under 3B1.1(c).

The government has also contended that petitioner organized the conspiracy, before going into prison. (Gov. Br). However, as has been shown, this conspiracy was ongoing before petitioner entered prison. Thus, no new organization occurred. Petitioner rather mentioned to his supplier, Mr. Cranshaw, and his purchaser, Ms. LaMacchia, that he wife would now be serving his role, exclusively. Although petitioner may have "negotiated" the drug sales originally, he is still no more responsible than any of the other participants to merit a 3B1.1 enhancement. See Brown, at 1381-82; 1385-86; see also, Hoac, at 1111 (although a defendant used organization skills in arranging for the importation of drugs, this is not the same as organizing other conspirators and would not justify an enhancement under Section 3B1.1(c)).

Although petitioner asked Elaine to take his place in the conspiracy and, unlike a supervisor, petitioner also asked his supplier and purchaser if it was okay for Elaine to take his place[5]; petitioner was still not the main participant nor did he receive the largest share of the benefit of this conspiracy. See United States v. Billingsley, 115 F.3d 458 (7th Cir. 1997) (enhancement warranted under 3B1.1(c) where the entire "episode" was defendant's idea and defendant was main participant and received the largest share of the benefit).

Even though petitioner was a part of this conspiracy

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[5]Someone in a true supervisory position would not need to ask the other participants for permission before deciding how business would be conducted.

Even though petitioner was a part of this conspiracy before he went to prison, none of the facts prove he had control over the other participants before or after he went to prison.

Regardless of petitioner's verbal prodding from prison, he is still not more responsible than the other participants, so as to merit the enhancement. See Hoac, at 1110-11.

> while all the facts suggest Chan was perhaps one of the more culpable defendants they do not indicate he exercised "control over others" or was responsible for organizing others.

As was stated in Sostre, at 729 & 734,

> an upward adjustment for exercising a managerial or supervisory role in drug transactions was not warranted where defendant never had cocaine in his possession, did not have ability to sell additional quantities, and did not have ability to complete transaction without co-defendants being present; defendant acted as "steerer" able to connect buyers and sellers but did not exert control over them.

Thus, we have a very similar set of circumstances here. After he went to prison, petitioner never had cocaine in his

possession, nor did he have the ability to sell additional quantities and he could not have completed any transactions without the presence of the other participants. Not to be forgotten in all of this is the fact that petitioner did not even know any transactions had occurred in his absence, until after the fact. Again, the question must be raised -- what kind of supervisor would not know that transactions were occurring?

What petitioner did was to merely "steer" together a buyer and seller, in the hopes of making some money while in prison and then suggest a way for these transactions to continue in his absence. Petitioner, just did not play the greater role, relative to that of all other participants, nor did he exhibit the necessary level of control over the others, to merit the enhancement under U.S.S.G. Section 3B1.1(c).

Therefore, the Court of Appeals for the Seventh Circuit was in error in affirming the sentence imposed by the district court.

CONCLUSION

For all of the foregoing reasons stated, petitioner humbly requests this Court issue a writ of certiorari.

Respectfully Submitted,

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APPENDIX

This Appendix contains all materials as required by Rule 14(i) of the Supreme Court.

In the
United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 7, 1997[1]

Decided August 7, 1997

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Eastern District of Wisconsin
No. 96-3672 v.	No. 96-CR-110
EUGENE A. SCHMITZ, SR. Defendant-Appellant.	Thomas J. Curran Judge.

ORDER

In 1996 Eugene Schmitz pleaded guilty to charges of conspiring to distribute cocaine and launder money. He participated in the conspiracy undeterred by the fact that he

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[1]After an examination of the briefs and the record, we have concluded that oral argument is unnecessary; accordingly, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a); Cir. R. 34(f).

APPENDIX "A"

was already serving a 60-month sentence on a 1994 federal conviction for a marijuana distribution conspiracy. At sentencing for the new offenses the district court added a two-level enhancement for Schmitz's supervisory role, U.S.S.G. § 3B1.1(c), and imposed a consecutive 68 months of imprisonment. Schmitz has now discharged his retained counsel and appeals pro se, challenging only the supervisory role enhancement. We affirm.

The essential background facts are undisputed. Up until he went to prison on the marijuana conviction, Schmitz purchased substantial quantities of cocaine from Frank Cranshaw and sold them to Judy LaMacchia. So that the business might continue in his absence, he made various introductions, first arranging with Cranshaw for his then wife, Elaine Schmitz, to take his place as buyer. He instructed her to refer to Cranshaw as "Sam" and the transactions as "golfing." Schmitz also introduced Elaine to LaMacchia, who agreed to purchase cocaine from Elaine. While Schmitz was in prison, he was recorded encouraging his wife in telephone conversations to go "golfing" with Cranshaw. In mail correspondence, Schmitz and Elaine also discussed methods of concealing the drug proceeds. Elaine purchased a number of money orders with the drug profits and sent them to Schmitz's prison commissary account for his personal use.

We review the district court's findings concerning Schmitz's aggravated role in the offense for clear error. United States v. Johnson-Dix, 54 F.3d 1295, 1309 (7th Cir. 1995). U.S.S.G. § 3B1.1(c) provides for a two-level enhancement where the defendant "was an organizer, leader, manager, or supervisor in [the] criminal activity." The guideline does not define these roles, but the commentary lists several factors to be used in evaluating the defendant's degree of responsibility, such as the exercise of

decisionmaking authority and the recruitment of accomplices. Id., comment (n.4). "The central purpose of § 3B1.1 is to punish a defendant for his relative responsibility within a criminal organization. Hence, no single factor is essential to determining whether a sentence should be adjusted under § 3B1.1." United States v. Fones, 51 F.3d 663, 665 (7th Cir. 1995) (citations omitted).

Relying on several of the factors in the commentary, the district court determined that Schmitz qualified for the enhancement because he had engaged in recruitment and organizational aspects of the offense, had exercised decisionmaking authority, and had enjoyed a relatively large share of the profits. Schmitz portrays himself as a mere intermediary or "steerer" who directed a willing buyer to a willing seller. But, as the district court's findings reflect, he seriously understates the significance of his role in the offense. Not only did he establish the drug supply line in the first instance, but he exercised ongoing authority by making the necessary introductions to continue it in his absence, instructing the participants on the code words to be used, encouraging the transactions from behind bars, and consulting with Elaine on concealing the proceeds. Although no single factor here has decisive weight, when considered collectively there is no question Schmitz was reasonably held accountable as more than a mere participant.

AFFIRMED.

COUNTY OF MILWAUKEE
MILWAUKEE METROPOLITAN DRUG
ENFORCEMENT GROUP
INTER-OFFICE COMMUNICATION

Date: June 17, 1996
To: C96-039 File
From: Investigator David E. Budde /s/ DEB
Subject: Debriefing of Frank L. Cranshaw

On Wednesday, June 5, 1996, at approximately 2:50 PM, Frank L. Cranshaw, m/w, dob 4-13-50 and his attorney, Robert Sfasciotti, appeared in the office of ADA Jack Stoiber for a debriefing. Also present were ADA Stoiber, IRS S/A Richard Arkenberg, P.O. Denise Zibolski, and I. ADA Stoiber discussed the contents of his June 3 letter regarding Cranshaw's cooperation with Cranshaw and Sfasciotti and then left. The debriefing lasted until approximately 4:15 PM, and was then resumed on Thursday, June 13, 1996, from 1:45 PM to approximately 3:20 PM. The same people were present for the second half of the debriefing with the exception of ADA Stoiber. Cranshaw provide the following information:

Cranshaw told us that he began using marijuana socially in 1980 and using cocaine socially in 1982. He sold small quantities of marijuana between 1980 and 1982 but stopped doing so when he got hooked on cocaine. In 1992 he started selling cocaine to support his drug habit, but he stopped selling after his arrest by DNE agents in 1993. Cranshaw has known Eugene Schmitz Sr. since high school. Around 1990-

91 he started seeing more of Schmitz Sr. through socializing with mutual friends. Cranshaw never saw Schmitz Sr. use any type of drugs, although Cranshaw suspected that he used cocaine because of Schmitz Sr.'s behavior when they went out. Cranshaw never bought or sold any drugs from or to Schmitz Sr., although he heard that Schmitz Sr. sold marijuana and cocaine.

In 1992, Cranshaw began buying more cocaine from his suppliers so that he could sell it and support his habit. He began by buying eight-balls, and the most he ever bought at one time was an ounce. The most Cranshaw ever sold at one time was an eight-ball.

Cranshaw knew that Schmitz Sr. was arrested in the summer of 1993. Approximately two weeks before Schmitz Sr. was supposed to report to federal prison, he asked Cranshaw to go to dinner with him and Elaine Schmitz. This dinner took place at the Packing House restaurant on the south side of Milwaukee [900 E. Layton Avenue]. At the bar before dinner, Schmitz Sr. asked Cranshaw if he would supply cocaine to Elaine Schmitz while he (Schmitz Sr.) was in prison, because she was going to need money. Cranshaw told Schmitz Sr. that it wasn't the right thing to do and that he (Cranshaw) wasn't really sure he wanted to do it; Schmitz Sr. told him to think about it. Schmitz Sr. said that if Cranshaw was willing to do it, they should have a plan and they should use the word "golfing" to refer to getting cocaine. If Cranshaw decided to get cocaine for Elaine, he would use the name "Sam", which was his nickname from high school. Cranshaw said that they were going to use the words

"golfing" and "Sam" so that they could safely refer to getting cocaine on the telephone and in letters. Elaine Schmitz was present for this conversation as well.

At this same dinner, Schmitz Sr. asked Cranshaw to take Elaine Schmitz out for dinner once a month because she had no other social life. Initially Cranshaw told us that he did not do so prior to his going to jail in January, 1995, but later admitted that he had taken Elaine out approximately once per month starting shortly after her husband went to prison.

Cranshaw served three months in the Kenosha County jail on work-release for his 1993 drug arrest. He was released in April, 1995. After his release, Schmitz Sr. began calling him and writing to him, pressuring him to take Elaine Schmitz "golfing", which Cranshaw knew to mean getting cocaine for her. Cranshaw said that Schmitz Sr. mentioned it in just about every telephone call and letter. Elaine Schmitz also brought it up to Cranshaw when she met him periodically for dinner, saying "it would really help me if you could do something for me" and telling him that Schmitz Sr. "was harping on her" to get cocaine. Elaine asked him to get her eight ounces of cocaine. Cranshaw did not want to get cocaine for her and he thought she did not really want to go through with it, but both of them were being pressured by Schmitz Sr. Cranshaw kept putting both of them off, but finally when it was near Elaine Schmitz's birthday (July 3), he decided to go through with it and get her cocaine.

Shortly before Elaine's birthday, Cranshaw called her from his job and told her that for her birthday he was going to

surprise her and take her golfing, meaning to get cocaine. Cranshaw asked her if she had the money and she said that she did. He told her not to tell anyone else, including Schmitz Sr. The reason Cranshaw did not want to tell Schmitz Sr. was that he thought it would only encourage Schmitz Sr. to bug him and Elaine more. Cranshaw said that about one and a half weeks before making this call to Elaine, he had paged his cocaine supplier, Jeff LNU, in Chicago and set up the deal to take place on July 1 in a restaurant parking lot in Chicago. Cranshaw could not recall the name of the restaurant but said it was on Touhy Avenue at Western, and that the meeting was to take place at 1 or 2 PM. The price for eight ounces of cocaine was $1200 per ounce.

On Saturday, July 1, 1995, at about 11 AM, Cranshaw met Elaine in the parking lot of the Brat Stop restaurant in Kenosha; the two of them then drove in Elaine's gray Honda to the restaurant in Chicago. Cranshaw had Elaine drive because he was nervous about driving out of state while being on probation. Upon arriving at the restaurant, they met Jeff and another white male. Elaine waited inside the restaurant while Cranshaw drove in her car and followed Jeff to a parking lot. Cranshaw took the money out of the Honda's glove compartment and took it to Jeff's car, where it was counted. They then went over to an unoccupied old blue Chevy, Jeff opened the trunk, and Cranshaw removed a small box containing eight clear ziploc baggies containing the cocaine. Each baggie of cocaine was inside another ziploc baggie. Cranshaw put the box in the trunk of Elaine's car and drove back to the restaurant, and then Elaine drove the two of them back to the Brat Stop. After splitting up at the Brat

Stop, he and Elaine met up again several hours later at the Chancery restaurant on S. 27th St. in Milwaukee and then went to Summerfest with another couple. Cranshaw identified the other couple as Mark Eicher and his girl friend Esther LNU, who are both professors at UW-Parkside.

Cranshaw said this was the only time he supplied cocaine to Elaine Schmitz. When the previous testimony of Elaine Schmitz regarding other deliveries was brought to his attention, he continued to deny supplying her on more than one occasion in July, 1995.

Cranshaw described Jeff as being a white male, approximately 33 yoa, 6', 220#, with black hair an a dark moustache. Jeff looks mexican but he isn't. Cranshaw does not know Jeff's last name. Cranshaw was introduced to Jeff by Jeff's cousin, Paul. The last time prior to July, 1995, that Cranshaw had purchased cocaine from Jeff was in 1991 or 1992 when he bought one ounce. When shown copies of his own telephone records for December, 1994, there were several calls to 312-308-0815; Cranshaw recalled that this was Jeff's pager number. Cranshaw could not explain why he called that number in December, 1994.

In August, 1995, Elaine Schmitz again asked Cranshaw to supply her with cocaine and he told her no. This discussion took place at a wedding reception that they attended together. They were supposed to have dinner at some rib place in September, 1995, but Elaine kept putting it off and after her arrest it never occurred.

Cranshaw admitted that the references to "golfing" with Elaine in his telephone calls with Schmitz Sr. are actually references to going to get cocaine. Cranshaw acknowledged that he wrote Schmitz Sr. a letter dated December 25, 1994, in which he referred to "being all done" and telling Elaine that. Cranshaw said that he was referring to not wanting to supply cocaine to Elaine Schmitz. In another letter dated June 10, 1995, Cranshaw wrote Schmitz Sr. and suggested that Schmitz Sr. had other friends who could take Elaine golfing; Cranshaw said that this also referred to taking Elaine to get cocaine.

Cranshaw told us that in April, 1995, he received a postcard and a letter from Schmitz Sr. in which Schmitz Sr. told Cranshaw that he could sleep with Elaine; when Cranshaw mentioned it to Elaine, she became very upset. Cranshaw said that he never had any sexual relationship with Elaine Schmitz.

In September, 1995, Cranshaw spoke with Elaine and she told him that police had conducted a search warrant at her house and found cocaine, but that it belonged to her stepson, Austin.

Several times after her arrest, Elaine spoke with Cranshaw about getting the telephone number of his supplier so that she could turn the supplier in, but Cranshaw refused to provide it because he and the supplier [Jeff] were friends. At the dinner meeting with Elaine in January, 1996, Elaine asked Cranshaw if he would supply her again with cocaine and he told her he might do so after everything was taken care of in her case,

but he said this only to make her feel better and had no intention of supplying her with cocaine again.

Cranshaw provided the following background information: Cranshaw was born in Kenosha and attended Bradford High School in Kenosha. He dropped out after his junior year in 1968, and later received his diploma through a program at Gateway Tech. Other than his service in the U.S. Army in 1970-72, Cranshaw has always lived in Kenosha. After his honorable discharge, Cranshaw returned to Kenosha and worked at Anaconda Copper, which later became Outokumpu Copper. He eventually became a shipping clerk there and was making approximately $13.15/hour with 10 hours of overtime/week at the time of his arrest in March, 1996. Cranshaw has no other outside employment. From 1990 to October, 1995, Cranshaw lived in a condo at 2914 14th Place; he moved in October, 1995, to the condo he currently owns at 1469 28th Court.

EVIDENCE

LAMACCHIA DEBRIEFING: Judy LaMacchia participated in a debriefing in which she admitted that she bought cocaine from Schmitz Sr. starting in early 1992. LaMacchia bought in one ounce quantities, paying $1800 per ounce. The deliveries took place in various locations in Kenosha County. Schmitz Sr. stopped selling to LaMacchia after his arrest in July, 1993, but resumed selling ounces of cocaine to her while out on bond in October or November, 1993. The price per ounce from October, 1993, onwards was $1600. The last delivery from Schmitz Sr. was in August, 1994. The total amount personally delivered by Schmitz Sr. to LaMacchia varies from 27 to 29 ounces, depending on which dates are used in the calculation. Prior to going to prison in late summer, 1994, Schmitz Sr. met LaMacchia in the parking lot of the Century 21 realty company (Colleen Realty, 4721 75th Avenue, Kenosha) where he worked and told her that she could continue to get cocaine from his wife, Elaine Schmitz. About two weeks after Schmitz Sr. went to prison, LaMacchia received a telephone call from Elaine Schmitz and they met at Kopp's Custard on W. Layton Avenue in Greenfield, where Elaine delivered an ounce of cocaine to LaMacchia. These meetings continued roughly on a monthly basis until September 15, 1995, when Schmitz' house was searched by the police. LaMacchia estimates that she received a total of 12 ounces of cocaine from Elaine Schmitz, paying $1600 per ounce. Using this estimate, it brings the total cocaine delivered by Schmitz Sr. or Elaine Schmitz to between 39 and 41 ounces.

APPENDIX "C"

METROPLITAN DRUG ENFORCEMENT GROUP
MILWAUKEE COUNTY, WISCONSIN

Number: C96-021
Date: 2-27-96

SUPPLEMENTAL REPORT
NAME: Statement of Elaine Schmitz

----------NARRATIVE----------

On Tuesday, February 27, 1996, P.O. Steve Streicher and I went to 12007 Elmhurst Parkway, Wauwatosa, and spoke to Elaine Schmitz. Elaine provided the following statement about her involvement in selling cocaine:

Prior to Eugene Schmitz Sr. going to federal prison in September, 1994, he suggested to Elaine that they could make some money while he was in prison by her selling cocaine. Eugene Sr. told Elaine that his friend, Judy LaMacchia of Kenosha, telephone number 414-654-9329, would be willing to buy ounces of cocaine for $1600 per ounce. Eugene Sr. told Elaine that another friend, Frank Cranshaw of Kenosha, would be willing to supply the cocaine that Elaine could then sell to LaMacchia.

On one occasion in 1994 prior to going to prison, Eugene Sr., Elaine, Frank Cranshaw, and a girlfriend of Elaine's went out for dinner to a restaurant on the south side of Milwaukee, possibly The Porterhouse. At that dinner, Eugene Sr. introduced Elaine to Cranshaw. At a subsequent dinner before going to prison, Eugene Sr., Elaine, and Cranshaw met at another restaurant on the south side of Milwaukee,

possibly The Packing House. At that dinner, Eugene Sr. asked Cranshaw about helping out him and Elaine by supplying Elaine with cocaine to sell while Eugene Sr. was in prison. Cranshaw was reluctant to discuss the matter and Elaine did not think it was really going to happen, but Eugene Sr. was insistent. At that dinner, Eugene Sr. or Cranshaw suggested that Cranshaw would be referred to by the name of "Sam." Eugene Sr. or Cranshaw also suggested that going to pick up cocaine would be referred to as "golfing."

Elaine said that she does not own a set of golf clubs and that she has only played twice in her life, once with Eugene Sr. and once in the spring of 1995 with Cranshaw. The time with Cranshaw was on a weekend at Bristol Oaks in Kenosha. She thinks this is the same course that Eugene Sr.'s nephew used to caddy at. Elaine has never taken golf lessons.

Elaine was introduced to LaMacchia by Eugene Sr. before he went to prison. This happened at the dog track in Kenosha.

After Eugene Sr. went to prison in September, 1994,

SUPPLEMENTAL REPORT
NAME: Statement of Elaine Schmitz

LaMacchia called Elaine from time to time asking what was going on and if Elaine was "ready to do lunch yet." This was understood between them to mean: did Elaine have cocaine to deliver? "Doing lunch" meant bringing one ounce of cocaine to LaMacchia. Because LaMacchia called Elaine a lot, and whined when Elaine kept telling her that nothing was going on, Elaine sometimes referred to LaMacchia as "the whiner." Eugene Sr. also referred to LaMacchia sometimes this way.

After Eugene Sr. went to prison, he repeatedly brought up the subject of Elaine selling some cocaine to make money in his telephone calls, letters, and personal visits. In his telephone conversations with Elaine and his letters to her, Eugene Sr. referred to getting cocaine with the "golf' code, and referred to Cranshaw as "Sam."

Eugene Sr. became very pushy about Elaine getting some cocaine to sell after she had to use some of his monthly income from the Rob LaMacchia mortgage payments to pay the final installment of the property taxes due on their home. The payment, which was due in April or May, 1995, was for about $1700. Normally, Elaine always took the monthly

SUPPLEMENTAL REPORT
NAME: Statement of Elaine Schmitz

Rob LaMacchia mortgage income checks and deposited them in her checking account. She then wrote a her own check to the Strong fund in the exact amount of the mortgage check, transfering the money to the Strong fund. She found that by the spring of 1995, she could not save enough from her wages to make the final installment payment. Eugene Sr. was very upset that she used part of the mortgage income to pay the property taxes, because "that was supposed to be their nest egg."

Eugene Sr. kept pushing Elaine to go out with Cranshaw for dinner in an effort to "butter him up" in anticipation of getting cocaine from him. Elaine did go out for dinner with Cranshaw on several occasions for that reason. Cranshaw had to be "buttered up" because he didn't really want to get cocaine for Elaine, but Eugene Sr. was insistent about Cranshaw doing it to help out Elaine's financial situation. Eugene Sr. kept pushing Elaine to meet with Cranshaw and get cocaine from him, as well as have him take some photographs of her for Eugene Sr. in prison.

Cranshaw couldn't really do anything about supplying cocaine until after May, 1995, because he was doing Huber

time for a drug conviction from a few months earlier. Cranshaw told Elaine that he didn't really want to do it because he had had a taste already of being incarcerated. Elaine met Cranshaw several times for dinner, and one time he became overly friendly. When she rebuffed his advances, Cranshaw showed Elaine two letters from Eugene Sr. in which Eugene Sr. gave Cranshaw his permission to sleep with Elaine in exchange for going to pick up cocaine. Elaine was very angry with Cranshaw and yelled at him while in his car that was parked at the restaurant. She thinks they were having dinner at Butch's on S. 27th and W. Rawson Ave. The next time she spoke to her husband, she screamed at him about it as well. Eugene Sr. subsequently told her that she needed to be nice to Cranshaw because Elaine's outburst had scared him off.

Sometime in June, 1995, Elaine met Cranshaw for dinner and they finally agreed that Cranshaw would get cocaine for Elaine to sell. Elaine told him to get eight ounces because she thought it would be cheaper and that way she wouldn't have to go through the process of getting it so frequently. Elaine did not tell Eugene Sr. that she and Cranshaw had agreed to this, however, because she still had reservations

about it and just didn't want to do it. In fact, she continued to tell Eugene Sr. that Cranshaw had said "no" to going "golfing".

On July 2, 1995, Elaine met Cranshaw at the Brat Stop in Kenosha at around 11:30 AM - 12 Noon. Cranshaw wanted her to drive, so they drove together to Chicago to pick up the cocaine in Elaine's 1992 gray Honda. With Elaine driving, they went to the parking lot of a Baker's Square restaurant somewhere on Touhy Ave. east of the expressway. They arrived about 1 PM and Elaine saw two assumed Mexican males get out of a car in the lot upon their arrival. When Elaine got out of the car and moved towards the two guys, one of them told her, "you wait inside, we'll be back in 20 minutes, it's better this way." Elaine did so, after giving Cranshaw $9600 in cash for eight ounces of cocaine. The cash came from money which Elaine had in the house from before Eugene Sr. went to prison. The money in the house came from cashing in various insurance policies and from cashed mortgage income checks. Cranshaw told her the price of the cocaine would be $1200 per ounce. Cranshaw drove Elaine's car and followed the car driven by the two Mexicans.

Cranshaw came back a short time later, picked up Elaine, and Elaine drove them back to the Brat Stop. The cocaine was in the trunk of the Honda, and Elaine was worried that it would melt, but Cranshaw just laughed when she told him of her concern. The cocaine was in two plastic baggies inside a cardboard shirt-type box.

Once Elaine got home she did not do anything with the cocaine for a few days after receiving it because she did not want to handle it when anyone else was in the house.

LaMacchia called her within a week of Elaine getting the cocaine from Cranshaw and received her first ounce delivery. Elaine thinks she told Eugene Sr. over the telephone sometime shortly after receiving the cocaine that she "went golfing."

Elaine provided information about past drug use by Eugene Sr. She said that in the past she felt that he was a fairly regular cocaine user. Although she never saw him personally use cocaine, he was "high" a lot and she discovered small packets of cocaine in his pants pockets on occasion. Elaine thinks he was selling cocaine, in part

because of the quantity found during the execution of the previous search warrant in 1993, but she does not have any direct knowledge of him selling cocaine. She thinks he was selling cocaine to people in the Kenosha area and that was why he kept selling real estate in Kenosha despite living in Milwaukee.